Supreme Court, U. S.
FILED
NOV 29 1978
MICHAEL RODAK, JR., CLERK

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1978

No. 78-729

ARROW FOOD DISTRIBUTORS, INC.
Petitioner

vs.

LLOYD F. LOVE, CONSERVATOR OF THE ESTATE
OF WILLIAM F. RILEY, JR.,
Respondent

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE STATE
OF MISSISSIPPI

RESPONDENT'S BRIEF IN OPPOSITION

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The respondent, Lloyd Love, Conservator of the Estate of William F. Riley, Jr., respectfully requests that this Court deny the Petition for Writ of Certiorari, seeking review of the Mississippi Supreme Court's judgment and opinion in this case. That opinion is reported at 361 So.2d 324 (Miss. 1978) and is appended to the Petition for Writ of Certiorari. (A1-A12)

QUESTIONS PRESENTED

None of the questions as phrased in the Petition for Writ of Certiorari are dispositive of the matter.

CONSTITUTIONAL PROVISIONS INVOLVED

Since the case turns upon independent and adequate state grounds there are no constitutional provisions properly before this Court.

STATEMENT OF THE CASE

The statement of the case set out in the Petition fails to set out the following particulars material to the issue presented:

(1) The Conservator's ward, William F. Riley, Jr., was and is a citizen of Natchez, Adams County, Mississippi. On September 28, 1976, a judgment in the amount of $248,920.00 was entered on a jury verdict in the Conservator's favor to

compensate the ward for serious physical and psychological injuries caused when petitioner's truck collided with the ward's vehicle. To date the judgment has not been paid and this Court has twice denied petitioner's stay of execution.

(2) The trial judge after hearing testimony and the Mississippi Supreme Court upon review of the record found that petitioner, Arrow Food Distributors, Inc., a non-resident corporation, was "doing business" in Mississippi and subject to the state's long arm jurisdiction. The petitioner's delivery truck which collided with respondent's ward was en route to Mississippi to deliver food products to its long-standing Mississippi customers.

As to the amount of business the corporation was doing in the state, the Mississippi Supreme Court made the following findings:

Nelson Desoto, vice president of appellant, testified that Arrow had sold foodstuffs in Mississippi continuously since 1951. Sales in Mississippi averaged $2,000 to $3,000 a week. A salesman would come to Mississippi and solicit orders. The orders would be filled in Louisiana and shipped by truck to Mississippi purchasers. Sales in Mississippi of $104,000 to $156,000 annually, in our opinion, constitute a substantial amount of business. In April, 1976, $9,000 was owed Arrow by Mississippi purchasers. On June 23, 1976, approximately $3,500 was still owed Arrow by Mississippi purchasers, and two delinquent accounts had been placed in the hands of attorneys for collection. Arrow had used Mississippi's highways for 15 years in delivering foodstuffs sold to Mississippi customers, and now would use Mississippi's courts in collecting debts due it. (A6)

(3) After removing the case to federal court, petitioner filed a lengthy pleading raising as its first defense that no cause of action was stated, and then stated jurisdictional objections. After remand petitioner filed a second responsive pleading setting up as its first defense that there was no equity on the face of the bill. Prior to a hearing on petitioner's jurisdictional attacks, petitioner noticed five depositions which were taken shortly after the hearing, and propounded eighty-eight interrogatories going to the merits of the case.

(4) The Mississippi Supreme Court did not actually consider the constitutionality of the state attachment statute, finding that petitioner's "doing business" in the state and its filing of a general appearance were dispositive of the jurisdictional questions.

I. IT IS UNNECESSARY AND IMPROPER FOR THIS COURT

TO CONSIDER PETITIONER'S ATTACK UPON THE STATE ATTACHMENT STATUTE, SINCE THE STATE COURT'S JURISDICTION RESTED UPON OTHER GROUNDS.

It is clear from the state court's opinion, found as "Appendix A" to the petition, and from the record, that the state court's jurisdiction was based upon three separate grounds. It is unnecessary for respondent to argue the merits and demerits of the Mississippi attachment statute, since there are other adequate grounds upon which the decision must rest. It is a settled rule of appellate procedure that the Supreme Court will not rule upon the constitutionality of a state statute, unless the Court's decision must turn on the statute. County of San Bernardino v. Southern Pac. R. R., 118 U.S. 417, 6 S.Ct. 1144, 30 L.Ed. 125 (1886) (Field, J., concurring).

This case began as an attachment case, but petitioner was found to be "doing business" in the state and was properly served with process under the state's long arm statute. In addition, petitioner's waiver of alleged jurisdictional irregularities mooted all possible ills.

II. THE DECISION OF THE STATE COURT IS BASED UPON INDEPENDENT AND ADEQUATE STATE GROUNDS.

This Court has long held that it will not review state court judgments which are based upon independent and adequate state grounds. Murdoch v. City of Memphis, 20 Wall 599, 22 L.Ed. 429 (1875). Petitioner's assertion that this rule is limited to substantive grounds is not correct. The Supreme Court has either explicitly or by implication found independent and adequate state grounds for a state court's disposition

of a case on procedural grounds in many cases. E.g., Wilson v. Loew's, Inc., 355 U.S. 597, 78 S.Ct. 526, 2 L.Ed. 519 (1958); Radio Station WON v. Johnson, 326 U.S. 120, 65 S.Ct. 1475, 89 L.Ed. 209 (1945); Brown v. Massachusetts, 144 U.S. 573, 12 S.Ct. 757, 36 L.Ed. 552 (1892). Furthermore, the only possible qualification of the rule when used in determinations of procedural matters is that the procedural rule serves a legitimate state interest. Henry v. Mississippi, 379 U.S. 443, 85 S.Ct. 546, 13 L.Ed.2d 408 (1965). In the case at bar, unlike Brinkerhoff-Ferris Co. v. Hill, 281 U.S. 673, 50 S.Ct. 451, 74 L.Ed. 1107 (1930), Mississippi's rule as to a party's waiver of jurisdictional defects by filing a general appearance was clearly engraved in state law and consistently applied. See McMillan v. Tate, 260 So.2d 832 (Miss. 1972); Maupin v. Dennis, 252 Miss. 496,

175 So.2d 130 (1965); Mladinich v. Kohn, 250 Miss. 138, 164 So.2d 785 (1964). Also, unlike counsel in Henry v. Mississippi, supra, there is no dispute that petitioner's counsel was and is a member of the Mississippi bar and should have been aware of Mississippi law.

The fact that one can waive alleged jurisdictional defects by not first clearly raising the jurisdiction question is a long-standing constitutional principle. Richardson Machinery Co. v. Scott, 276 U.S. 128, 48 S.Ct. 264, 72 L.Ed. 497 (1928); Jones v. Andrews, 10 Wall 327, 19 L.Ed 935 (1870). Scott, supra, has facts very similar to the instant case and is controlling.

In Scott, supra, after a default judgment had been rendered against petitioner corporation, it filed a special appearance in state court and then removed the case to federal court on the ground of diversity of

citizenship. The case was remanded to state court, where petitioner again filed a petition to vacate the judgment on both jurisdictional and nonjurisdictional grounds. In ruling that the judgment against the petitioners rested on an adequate state (non-federal) ground, this Court said:

> Since the founding of the state, it has been the settled law of Oklahoma that where a person against whom a judgment is rendered files a petition to vacate the judgment upon the ground that the court had no jurisdiction of the defendant, and the petition is based also on nonjurisdictional grounds, . . . the filing of the petition operates as a voluntary general appearance, with the same effect as if such appearance had been made at the trial. 276 U.S. 128, 133

Petitioner's reliance upon the case of Davis, Director General of Railroads, Etc. v. Wechsler, 263 U.S. 22, 44 S.Ct. 13, 68

L.Ed. 143 (1923) is misplaced. In Davis the state court applied federal law, not a state procedural rule. Also, respondent has never claimed that petitioner's removal of the case to federal court was the act constituting a general appearance. Petitioner's further conduct, which conduct was in the record before the state court judges, is what constituted a general appearance. In petitioner's answer filed in federal court, it raised as its first defense that no cause of action was stated, continued to contest jurisdiction, and then answered on the merits. After the case was remanded to state court, petitioner voluntarily filed another similar pleading in which its first defense was that there was no equity on the face of the complaint. Although filing a "special appearance" may not be required by the federal rules, petitioner had a second chance to plead according to estab-

lished state practice and did not. Furthermore, almost two weeks prior to arguing the alleged jurisdictional defects, petitioner noticed five depositions and propounded eighty-eight interrogatories going to the merits of the case.

By its pleading and conduct, petitioner entered a general appearance under Mississippi law, much the same as the petitioner in Scott, supra. Mississippi's application of its procedural rule was fair and sound. The rule serves the legitimate state interest of requiring a defendant, at the earliest possible time, to clearly demonstrate to the Court and to the plaintiff that he intends to contest jurisdiction. This procedure works for an efficient use of the Court's time and the time and resources of the parties.

III. THE FINDING BY THE STATE COURT THAT THE NON-RESIDENT PETITIONER

WAS SUBJECT TO JURISDICTION UNDER THE STATE'S "LONG-ARM" STATUTE DID NOT VIOLATE DUE PROCESS AND WAS BASED UPON SUBSTANTIAL EVIDENCE.

Petitioner's construction of International Shoe Co. v. Washington, 326 U.S. 310, 66 S.Ct. 154, 90 L.Ed. 95 (1945) and Perkins v. Benquet Consolidated Mining Co., 342 U.S. 437, 72 S.Ct. 413, 96 L.Ed. 485 (1952), is too narrow. These cases clearly hold that a non-resident may be brought to justice in a state where it has sufficient contacts, even if the cause of action did not arise in that state. Furthermore, in the instant case the accident had a real connection to the forum state: (1) petitioner's delivery truck was on its way to Mississippi to deliver foodstuffs previously ordered by long-standing Mississippi customers and (2) the injured party was and is a

resident of Mississippi. Petitioner has consistently attempted to play down the fact that it had substantial and systematic contact with Mississippi for over fifteen years. The Mississippi Supreme Court found,

> Nelson Desoto, vice president of appellant, testified that Arrow had sold foodstuffs in Mississippi continuously since 1951. Sales in Mississippi averaged $2,000 to $3,000 a week. A salesman would come to Mississippi and solicit orders. The orders would be filled in Louisiana and shipped by truck to Mississippi purchasers. Sales in Mississippi of $104,000 to $156,000 annually, in our opinion, constitute a substantial amount of business. In April, 1976, $9,000 was owed Arrow by Mississippi purchasers. On June 23, 1976, approximately $3,500 was still owed Arrow by Mississippi purchasers, and two delinquent accounts had been placed in the hands of attorneys for collection. Arrow had used Mississippi's highways for 15 years in delivering

> foodstuffs sold to Mississippi customers, and now would use Mississippi's courts in collecting debts due it. (A6)

* * *

> . . . [T]he chancellor found that Arrow over the years had done and was still doing a substantial amount of business in Mississippi at the time this cause of action accrued. We cannot say that the chancellor was wrong in his finding. (A8-9)

Petitioner has not contested these facts but would only try to characterize them differently. However, they undoubtedly show that petitioner's contacts with the state were more than sufficient to be an independent basis of jurisdiction.

Mississippi has clearly determined to open its courts to the fullest extent allowable under the U.S. Constitution. See Vicksburg S. & P. R. Co. v. Forcheimer, 113 Miss. 531, 74 So. 418 (1927). Furthermore, Miss.

Code Ann. (1972) §79-1-27 clearly allows jurisdiction over the petitioner in the instant case. This section reads as follows:

> Any corporation claiming existence under the laws of any other state or of any country foreign to the United States, found doing business in this state, shall be subject to suit here to the same extent that corporations of this state are, whether the cause of action accrued in this state or not. (Emphasis added).

Miss. Code Ann. (1972) §13-3-57, Mississippi's "long-arm statute", allows process for a non-resident defendant who commits a tort in the state or who is doing business in the state to be served with process through the Mississippi Secretary of State. In its finding that the Mississippi Court had proper jurisdiction over petitioner, the Mississippi Supreme Court stated:

> In our opinion section 13-3-57 and 79-1-27 must be read together, construed together and harmonized one with the other. When this is done and full meaning is given to the language used in each section, it is clear to us that 13-3-57 complements 79-1-27 in furthering the state's avowed policy as expressed in Vicksburg S. & P. R. Co. v. Forcheimer, supra, to "open the door" of our Mississippi courts to foreign corporations found doing business in this State to sue and be sued here on all bona fide causes of action. (A8)

Respondent recognizes that this Court has the power to review the facts in determining if a federal right has been violated. In the instant case, however, such a review would be unnecessary and unfruitful. The facts of petitioner's contacts with Mississippi are not disputed and are supported by substantial evidence in the record. This Court has indicated that it will give great, if not controlling, weight to the state court's findings of fact and uphold a decision based upon substantial evidence. Pickering v. Board of Education, 391 U.S.

563, 88 S.Ct. 1731, 20 L.Ed.2d 811 (1968); General Motors Corp. v. Washington, 377 U.S. 436, 12 L.Ed.2d 430, 84 S.Ct. 1564 (1964).

The Supreme Court of the State of Mississippi took an in-depth look at the jurisdictional facts. The Court's decision is soundly based upon the law and the facts. This Court need only to summarily affirm that Court's determination.

CONCLUSION

For the reasons stated above, Respondent submits that the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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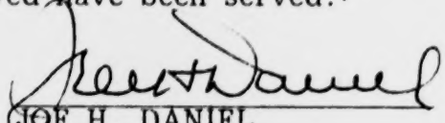
CERTIFICATE OF SERVICE

I hereby certify that on this the 28th day of November, 1978, three copies of Respondent's Brief in Opposition were mailed, postage prepaid, to Heber Ladner, Jr., Esq., a member of the firm of Upshaw, Schissel, Dorizas and Ladner, 1646 Capital Towers, Jackson, Mississippi 39201, attorney of record for the petitioner. I further certify that all parties required to be served have been served.



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